

## NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

JUN 03 2008

HAROLD S. MARENUS, CLERK U.S. BKCY. APP. PANEL OF THE NINTH CIRCUIT

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In re:

RUSSELL D. WARD,

RUSSELL D. WARD,

THE PAUL REVERE LIFE INSURANCE COMPANY,

Debtor.

Appellant,

Appellee.

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OF THE NINTH CIRCUIT

BAP No. SC-07-1333-KPaJu Bk. No. 05-13284

Adv. No. 06-90114

MEMORANDUM\*

Argued and Submitted on May 15, 2008 at Pasadena, California

Filed - June 3, 2008

Appeal from the United States Bankruptcy Court for the Southern District of California

Honorable John J. Hargrove, Chief Bankruptcy Judge, Presiding

Before: KLEIN, PAPPAS and JURY, Bankruptcy Judges.

<sup>\*</sup>This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (<u>see</u> Fed. R. App. P. 32.1), it has no precedential value. <u>See</u> 9th Cir. BAP Rule 8013-1.

This is a case of insurance fraud in which a debt for \$290,260 in unwarranted disability payments was determined on summary judgment to be owed by the debtor and to be nondischargeable under 11 U.S.C. § 523(a)(2). In addition to appealing the merits of the money judgment and declaration of nondischargeability, the pro se debtor, a former attorney, also asserts a variety of procedural theories, including that the determination of liability for the debt was a non-core proceeding, that supposed findings of fact and conclusions of law were not sufficiently specific to enable appellate review, that evidentiary issues existed as to material fact, and that new matters not previously alleged in the adversary complaint were raised in the appellee's summary judgment motion. We AFFIRM.

FACTS

The adversary proceeding and the underlying bankruptcy case are part of a larger web of deceptive activities that have led to a federal criminal conviction of the debtor, Russell D. Ward, for tax fraud conspiracy.

Ward was admitted to the California State Bar in 1988 and resigned in 1997 due to numerous complaints and formal charges pending against  $\lim_{n \to \infty} 1$ 

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<sup>&</sup>lt;sup>1</sup>By 1994, at least twenty-two separate complaints had been made to the State Bar regarding Ward, including forgery, moral turpitude, trust account violations, and failure to communicate. In November 1994, the State Bar filed formal charges against Ward with regard to six of these cases. By 1996, Ward had amassed more than thirty complaints against him and the State Bar had commenced formal charges on eighteen of those cases. After the State Bar placed Ward's license on involuntary inactive status (continued...)

On December 14, 1994, a month after the State Bar had filed formal charges against Ward with respect to six cases, Ward applied for a disability policy from appellee Paul Revere Life Insurance Company ("Paul Revere"). Ward did not disclose the pending State Bar charges against him. Unaware of any scheme and relying upon representations in Ward's application, Paul Revere issued Ward a disability insurance policy as of February 14, 1995.

In February 1996, Ward made a claim against the disability policy. Ward did not disclose the pending State Bar disciplinary proceedings to Paul Revere when he made his claim. Ward claimed that an alleged automobile accident caused him "anxiety, stress + major depressive disorder," completely disabling him and leaving him unable to perform the duties of an attorney.<sup>2</sup>

On April 26, 1996, Paul Revere began paying Ward benefits under the policy. The payments were made under an express reservation of rights pending investigation of its liability under the claim. Paul Revere made payments until June 29, 2001, totaling about \$290,260.

<sup>20 (...</sup>continued)

and with an impending trial on at least one of the cases scheduled in three days, on December 12, 1997, Ward resigned from the State Bar with charges pending.

<sup>&</sup>lt;sup>2</sup>Claimant's Statement for Disability Benefits, Ex. 7 to App. of Exs. in Supp. of Mot. for Summ. J. (June 5, 2007).

<sup>&</sup>lt;sup>3</sup>Ward contends that \$290,260 is too high because the declaration in support of Paul Revere's motion indicates that 63 monthly payments were made and initially set at \$3,800 then raised to \$4,480 (whether retroactively is unclear), which implies that payments would not have exceeded \$282,240. There are, however, multiple difficulties. First, no counter evidence (continued...)

Paul Revere's investigation of Ward's claim revealed discrepancies as to his pre-disability income and revealed that he had provided false and misleading information regarding his employment as a corporate attorney for R.A. Shacket, Inc., a medical corporation.<sup>4</sup> When Paul Revere pressed Ward for proof of his pre-disability income, he claimed to have done work for King Medical and submitted a Form 1099 from King Medical showing gross income for 1994 of \$78,000.<sup>5</sup> Ward later admitted in the federal

 $^{3}$  (...continued)

addressed to the calculation is presented. Second, there are sufficient plausible explanations for a damages total that is within 3 percent of the apparent maximum, that the question does not present a genuine issue of material fact.

'Ward's insurance application listed his occupation as "attorney," employer as "R.A. Shacket, Inc.," and length of employment as ten months. Ward also stated that his earned income was \$84,000 for the then-current year 1994 and \$50,000 for the prior year 1993. In a letter to Paul Revere, dated December 15, 1994, Shacket verified that his corporation retained the services of Ward since February 1, 1994, as the corporate attorney of record at a \$6,000 per month salary.

Notwithstanding the representations on his application, Ward later represented on his claim for disability that he was "self employed (corp. attorney for R.A. Shacket, Inc.)." When Paul Revere requested proof of Ward's pre-application income, Ward submitted a Form 1099 from R.A. Shacket, Inc., rather than a W-2 form, indicating a gross income paid to Ward in 1994 of \$78,000. This amount did not match the \$84,000 income stated on Ward's application. Further, the \$6,000 per month salary alleged in Shacket's letter would mean that Ward would have only received \$66,000 in 1994, not \$78,000 as stated in the Form 1099.

<sup>5</sup>Ward also argues that Paul Revere's investigation included information (that belied his assertions regarding prepetition income) that was obtained in violation of law. We do not rely on the Social Security Administration information in making our decision. We note, however, that in the authorization section of his Claimant's Statement for Disability Benefits, Ward authorized the Social Security Administration to release to Paul Revere information about his account.

criminal matter against him that King Medical was a "fictitious corporation set up by [Ward and Shacket] as part of their criminal agreement to impede the Internal Revenue Service."

Information at 11, <u>United States v. Ward</u>, Case No. 01 CR 2258 JM (S.D. Cal. July 25, 2001). Notwithstanding Ward's representations to Paul Revere that he was completely disabled, he continued to receive post-disability income without disclosing this to Paul Revere. Until September 1997, more than a year and a half after he began receiving disability payments from Paul Revere, Ward continued to receive the \$6,000 monthly payments from Shacket. Ward also maintained several "client trust accounts," including an account in Las Vegas, for almost three years after his alleged disability began.

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Pursuant to the criminal information filed July 21, 2001, Ward pled guilty to conspiring with Shacket and others to income tax fraud, and was later sentenced to eighteen months in federal prison. As part of his plea agreement, Ward admitted that King Medical was a sham corporation created by Ward and Shacket to defraud the federal government. <u>United States v. Ward</u>, Case No. 01 CR 2258 JM (S.D. Cal. July 25, 2001). Also in 2001, Shacket was indicted on thirty-six counts involving tax fraud, later pled guilty, and was sentenced to prison.

In 2002, Paul Revere sued Ward and others in the United States District Court alleging insurance fraud, rescission, and other causes of action. $^6$ 

<sup>&</sup>lt;sup>6</sup>In the United States District Court for the Southern District of California in Case No. 02cv2235-BEN (WMC) against Ward, Shacket, and others, Ward counterclaimed, seeking (continued...)

On October 14, 2005, Ward filed a chapter 7 bankruptcy case, listing Paul Revere as a disputed creditor. Ward was granted a discharge on January 27, 2006.

On January 23, 2006, Paul Revere timely filed an adversary proceeding to except its debt from discharge based on alleged insurance fraud pursuant to 11 U.S.C. §§ 523(a)(2)(A), (a)(2)(B), and (c).

After the bankruptcy court denied Ward's motion to dismiss the complaint but granted his motion to strike the portion of the adversary complaint that incorporated Paul Revere's complaint against Ward that was pending in the district court, Ward filed his answer on May 26, 2006. He contended that the determination of the existence of a debt under state tort or contract law was a non-core proceeding, objected to the bankruptcy court entering an order or judgment on the non-core issues, and demanded a jury trial. He further alleged that his discharge had terminated any unfiled claims arising under state tort or contract law.

Following discovery cutoff, on June 5, 2007, Paul Revere filed a motion for summary judgment, or alternatively, for

<sup>&</sup>lt;sup>6</sup>(...continued)

declaratory relief and alleging breach of contract, insurance bad faith, intentional infliction of emotional distress, negligent infliction of emotional distress, and invasion of privacy. The district court granted summary judgment in favor of Paul Revere as to all causes of action in Ward's counterclaim, ruling that he was never entitled to disability benefits under the policy. The district court concluded that, because Ward's resignation from the State Bar with charges pending created a "legal disability" that pre-dated any physical disability that Ward may have had, he was never entitled to benefits under the policy. The district court case was later stayed by the filing of Ward's bankruptcy petition.

summary adjudication of facts, and Ward cross-filed a motion for judgment on the pleadings, or alternatively, for summary judgment.

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Paul Revere contended that the facts were undisputed that it had a \$290,260 claim against Ward for the benefits paid to Ward under the insurance policy and that the claim against Ward was nondischargeable. Paul Revere also argued that, because the district court had previously granted Paul Revere's motion for summary judgment in the district court case ruling that Ward was not entitled to any of the disability benefits paid under the policy, then either the doctrine of issue preclusion or the law of the case doctrine applied.

In his cross-motion, Ward argued that Paul Revere only had an alleged claim for nondischargeability because the debt was not first established under state tort or contract theories, and thus, the proceeding was improperly before the bankruptcy court as a non-core proceeding. Ward further contended that Paul Revere raised new claims in its motion not alleged in the complaint, that the statute of limitations barred Paul Revere's claims, and that its evidence, including business records and declarations, was hearsay.

At the hearing on July 3, 2007, the bankruptcy court granted Paul Revere's motion for summary judgment and denied Ward's cross-motion. The bankruptcy court incorporated its tentative ruling into the final ruling and final judgment.

It concluded that, because there were no genuine issues of material fact as to Ward's fraud, Paul Revere was entitled to a \$290,260 judgment as a matter of law. Furthermore, pursuant to

§§ 523(a)(2)(A) and (B), Paul Revere's claim and judgment against Ward was not dischargeable. As to the other issues raised by the parties, the bankruptcy court ruled that Paul Revere had not alleged any new theories of fraud not previously raised in its complaint, that neither the doctrine of collateral estoppel (i.e., issue preclusion) nor the law of the case doctrine applied, that Paul Revere was not barred to bring its action for relief based on fraud by the three-year statute of limitations, and that Ward's evidentiary objections were overruled.

The bankruptcy court entered its Amended Minute Order incorporating its tentative ruling on the same day. The order denying Ward's cross-motion was entered on August 21, 2007.

The judgment awarding \$290,260 to Paul Revere and declaring the judgment to be excepted from discharge pursuant to \$523(a)(2) was entered on August 21, 2007.

Ward subsequently filed objections and supplemental objections to the orders and findings of the bankruptcy court and requested de novo review by the district court.

This timely appeal ensued.

JURISDICTION

The bankruptcy court had jurisdiction via 28 U.S.C.  $\S$  1334. We have jurisdiction under 28 U.S.C.  $\S$  158(a)(1).

ISSUES

(1) Whether determination of the existence and amount of debt is a core issue.

- (3) Whether the bankruptcy court erred in overruling Ward's evidentiary objections to introduction of business records as summary judgment evidence.
- (4) Whether the bankruptcy court erred in concluding that Paul Revere's summary judgment motion did not allege any new theories of fraud.
- (5) Whether the bankruptcy court erred in granting Paul Revere's motion for summary judgment awarding \$290,260 to Paul Revere and determining that Paul Revere's claim and judgment against Ward were excepted from discharge pursuant to 11 U.S.C. \$\\$ 523(a)(2)(A) and (B).

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## STANDARDS OF REVIEW

We review summary judgment de novo to assess whether there is a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. Khaligh v. Hadaegh (In re Khaligh), 338 B.R. 817, 823 (9th Cir. BAP 2006), aff'd & adopted, 506 F.3d 956, 957 (9th Cir. 2007).

Whether the bankruptcy court erred in overruling the debtor's evidentiary objections is reviewed for abuse of discretion. <u>Lee-Benner v. Gergely (In re Gergely)</u>, 110 F.3d 1448, 1452 (9th Cir. 1997).

## DISCUSSION

In addition to appealing the bankruptcy court judgment based on the grant of summary judgment determining the existence of the

\$290,260 debt and determining that the debt was nondischargeable, Ward raises a variety of putative procedural errors said to have been made by the bankruptcy court. We address the procedural issues before addressing the actual ruling on the merits.

Ι

Ward asserts that the determination of the existence of a debt based on tort or contract law is a non-core issue outside the jurisdiction of the bankruptcy court. He further contends that, because the determination of the existence of a debt under state law is a non-core proceeding, his rights to de novo review by an Article III judge and trial by jury have been violated.

None of the positions has merit.

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Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11. 28 U.S.C. § 157(b)(1). Core proceedings include determinations as to the dischargeability of particular debts. 28 U.S.C. § 157(b)(2)(I).

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Ward contends that, even if the determination of dischargeability is a core proceeding, establishing the existence of the debt itself under state law is a non-core matter not properly before the bankruptcy court.

The Ninth Circuit has expressly rejected Ward's position and has long held that the bankruptcy court has core jurisdiction to enter a money judgment on a disputed state law claim in the course of making a determination that a debt is nondischargeable.

Sasson v. Sokoloff (In re Sasson), 424 F.3d 864, 868 (9th Cir.
2005); Cowen v. Kennedy (In re Kennedy), 108 F.3d 1015, 1016 (9th Cir. 1997).

Bankruptcy courts have core jurisdiction over nondischargeability actions brought pursuant to § 523(a). 28 U.S.C. § 157(b)(2)(I); see Rein v. Providian Fin. Corp., 270 F.3d. 895, 904 (9th Cir. 2001). The instant case involves a dischargeability action brought pursuant to § 523(a)(2).

The Ninth Circuit in <u>Kennedy</u> was "particularly persuaded" by the reasoning that, "[i]f it is acknowledged as beyond question that a complaint to determine dischargeability of a debt is exclusively within the equitable jurisdiction of the bankruptcy court, then it must follow that the bankruptcy court may also render a money judgment in an amount certain without the assistance of a jury" and that "[t]his is true not merely because equitable jurisdiction attaches to the entire cause of action but more importantly because it is impossible to separate the determination of dischargeability function from the function of fixing the amount of the non-dischargeable debt." <u>Kennedy</u>, 108 F.3d at 1017-18.

Thus, the bankruptcy court had the power to hear and determine the existence of the \$290,260 debt as well as to determine that the debt was nondischargeable.

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Paul Revere correctly points out that, even if the bankruptcy court had erred in determining the matter to be a core proceeding and notwithstanding the assertion of non-core status

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in the answer, Ward waived any assertion of the right to de novo review by the district court because he consented to resolution and entry of the final order by the bankruptcy court when he brought his motion for judgment on the pleadings, or alternatively, for summary judgment, which expressly requested that the bankruptcy court enter a final judgment on his behalf.

Parties who seek relief from the bankruptcy court impliedly consent to the bankruptcy court's jurisdiction. See Mann v.

Alexander Dawson, Inc. (In re Mann), 907 F.2d 923, 926 (9th Cir. 1990) (conduct of never objecting to bankruptcy court's jurisdiction prior to time it rendered judgment is consent to court's jurisdiction).

During the hearing, the bankruptcy court determined that the entire nondischargeability action was a core proceeding. <u>See</u>
Hr'g Tr. 81:21-25 (July 3, 2007). As such, if a trial had been held, the bankruptcy court was not required to submit proposed findings of fact and conclusions of law to the district court, nor did Ward have a right to de novo review by the district court before the entry of a final order.

Of course, as the matter was resolved on summary judgment, the appellate review is de novo. Thus, Ward could have had his de novo review by the district court if only he had timely so elected under 28 U.S.C. § 158(c)(1)(A). Since the appeal is properly before this Panel, we are conducting the de novo review and Ward's Article III review is available from the court of appeals.

Furthermore, as we already have explained, the determination of the existence of the debt in the context of the

nondischargeability action is actually a core proceeding squarely within the jurisdiction of the bankruptcy court.

С

Ward also contends that he has a Seventh Amendment right to trial by jury on Paul Revere's claim. This position also lacks merit.

The fundamental flaw in Ward's argument is that he voluntarily invoked the equitable claim resolution procedures of bankruptcy when he filed his bankruptcy case. See Hickman v.

Hana (In re Hickman), 384 B.R. 832, 839 (9th Cir. BAP 2008) (act of filing voluntary chapter 7 case invokes equitable jurisdiction of bankruptcy court and debtor thereby agrees to litigate adversary proceeding in equitable proceedings in which Seventh Amendment does not apply); cf. Langenkamp v. Culp, 498 U.S. 42, 45 (1990), reh'g denied, 498 U.S. 1043 (1991) (per curiam) (no Seventh Amendment jury trial for creditor who files proof of claim).

As such, regardless of whether Ward would have a Seventh Amendment right to jury trial in a nonbankruptcy setting on Paul Revere's cause of action for civil fraud, he does not have such a right on Paul Revere's complaint in the bankruptcy court.

Ward also asserts that the bankruptcy court's order is not adequate for appellate review. In particular, he argues that, after an extended hearing on the motions occurred, the court did not render clear findings of fact and conclusions of law, but

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instead incorporated its tentative ruling into the Amended Minute Order as the basis for the court's judgment and order entered. We are satisfied that this is adequate.

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While a court is expected to explain its reasoning, findings of fact and conclusions of law are not required for motions under Rule 12 and Rule 56. See Fed. R. Civ. P. 52, incorporated by Fed. R. Bankr. P. 7052. It is permissible for a court to explain itself in any manner, including a tentative decision, so long as the explanation is included in the record.

The bankruptcy court ruled on Paul Revere's Rule 56 motion for summary judgment, and, thus, was not required to issue separate findings of fact and conclusions of law. In fact, the Ninth Circuit points out in Zilog that a bankruptcy court has "no authority" to make such findings on summary judgment that are eligible for deferential clearly erroneous review as provided in Rule 52(a). See Zilog, Inc. v. Corning (In re Zilog, Inc.), 450 F.3d 996, 1002 (9th Cir. 2006) (district court erred by deferring to the bankruptcy court's explicit factual findings that bankruptcy court had no authority to make on motion for summary judgment).

Furthermore, we are persuaded that the record is sufficient for appellate review, as the Amended Minute Order incorporates the bankruptcy court's detailed tentative ruling. The record also includes the hearing transcript and all of the pleadings, declarations, and other summary judgment evidence available for review.

The court did not err in relying on the reasoning it set forth in its Amended Minute Order, which incorporated its

tentative ruling, in entering its judgment and order granting
Paul Revere's motion for summary judgment. There is no merit to
the argument that the court was required to issue separate
findings and conclusions on a motion for summary judgment. The
record is sufficient for appellate review.

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The court's evidentiary rulings are questioned because Rule 56(e) requires affidavits be limited to facts that "would be admissible in evidence." Fed. R. Civ. P. 56(e), incorporated by Fed. R. Bankr. P. 7056.

III

During the hearing, the bankruptcy court overruled Ward's evidentiary objections to the declaration of Hope Troilo, a senior customer care specialist of Paul Revere's parent company, rejecting Ward's contention that Ms. Troilo lacked personal knowledge and was not the custodian of the records.

Contrary to Ward's arguments, foundation for admission of business records does not require that the custodian of records is the sole permissible witness. The phrase "other qualified witness" in the foundational requirements of Federal Rule of Evidence 803(6) is broadly interpreted to require only that the witness understand the record-keeping system. <u>United States v. Childs</u>, 5 F.3d 1328, 1334 (9th Cir. 1993); <u>United States v. Ray</u>, 930 F.2d 1368, 1370 (9th Cir. 1991).

The bankruptcy court agreed with Paul Revere's position that sufficient foundation was established that the documents offered qualified under the business records exception, in which a presumption as to their accuracy and truthfulness would apply.

We agree.

Thus, we hold that the bankruptcy court did not abuse its discretion in overruling Ward's evidentiary objections to the summary judgment evidence.

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IV

Ward next argues that Paul Revere attempted to add new theories of fraud in its summary judgment motion that were not alleged in the adversary complaint and adds that fraud must be pled with the particularity required by Federal Rule of Civil Procedure 9(b).

The bankruptcy court concluded that Paul Revere's summary judgment motion did not allege new theories of fraud but "simply fleshes out the facts alleged in its nondischargeability complaint regarding debtor's fraud" and that these "additional facts are consistent with [Paul Revere's] complaint alleging nondischargeability under Section 523(a)(2)(A) and (B)." Amended Minute Order at 2, section 1 (July 3, 2007). We agree.

The bankruptcy court did not err. Moreover, as stated in the bankruptcy court's Amended Minute Order, Ward could have attacked the complaint for lack of specificity under Federal Rule Civil Procedure 9(b), incorporated by Federal Rule of Bankruptcy Procedure 7009, at an earlier time, but he waived this right by not doing so. Thus, Ward was not prejudiced by additional facts brought in that are consistent with Paul Revere's complaint.

V

In reviewing the merits of the bankruptcy court's decision to grant Paul Revere's motion for summary judgment awarding \$290,260 to Paul Revere and its determination that Paul Revere's claim and judgment against Ward was not dischargeable pursuant to \$\$ 523(a)(2)(A) and (B), we first discuss the rules of summary judgment before turning to the specifics of this case.

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We review summary judgment de novo to assess whether there is a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. Khaligh, 338 B.R. at 823.

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A summary judgment shall be rendered forthwith if the movant can show that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c), incorporated by Fed. R. Bankr. P. 7056.

The mere existence of <u>some</u> alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no <u>genuine</u> issue of <u>material</u> fact. <u>Anderson v. Liberty Lobby, Inc.</u>, 477 U.S. 242, 247 (1986) (emphasis in original).

The movant seeking summary judgment bears the initial burden of establishing, in light of the pleadings, depositions, answers to interrogatories, admissions, and affidavits, the absence of a genuine issue of material fact. However, the ultimate burden of demonstrating the existence of a genuine issue of material fact

lies with the non-moving party. <u>Horphag Research Ltd. v. Garcia</u>, 475 F.3d 1029, 1035 (9th Cir. 2007).

When the movant has carried its burden under Rule 56(c), the non-moving party must come forward with "specific facts showing that there is a genuine issue for trial." <u>Garcia</u>, 475 F.3d at 1035 (quoting Fed. R. Civ. P. 56(e)); <u>see also Hayes v. Palm Seedlings Partners (In re Agric. Research)</u>, 916 F.2d 528, 533 (9th Cir. 1990). Ward has not done so.

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11 U.S.C. §§ 523(a)(2)(A) & (B).

Paul Revere asserts that overwhelming uncontroverted evidence exists that Ward committed insurance fraud against Paul Revere. In proving that the debt is nondischargeable on grounds of fraud under §§ 523(a)(2)(A) and (B), and thus, that the

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Although Ward was granted a discharge, the judgment establishes that Paul Revere's right to recover \$290,260 in disability insurance payments made to Ward is excepted from discharge pursuant to §§ 523(a)(2)(A) and (B).

A debtor is not discharged from any debt for money to the extent obtained by:

- (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;
- (B) use of a statement in writing --(i) that is materially false;
  (ii) respecting the debtor's or an insider's
  financial condition;
  (iii) on which the creditor to whom the debtor is
  liable for such money, property, services, or
  credit reasonably relied; and
  (iv) that the debtor caused to be made or

published with intent to deceive. . . .

bankruptcy court did not err in granting Paul Revere's summary judgment motion, Paul Revere contends: (1) that Ward failed to disclose in his insurance application that he was facing disciplinary proceedings that could result in his disbarment; (2) that Ward falsely stated in his application that his income was from the practice of law, rather than from a criminal enterprise; (3) that Ward failed to disclose the disciplinary proceedings when he made his claim for benefits; (4) that Ward misrepresented that King Medical was his client and that he earned \$78,000 in legal fees from King Medical in 1994; and (5) that Ward did not disclose in his insurance claim that he was still receiving \$6,000 per month from Shacket.

Although Ward disputes the alleged facts or that they were material, he has not established the existence of a genuine issue of material fact.

Because of overlapping issues involved, the bankruptcy court addressed both Ward's motion for judgment on the pleadings, or alternatively, for summary judgment and Paul Revere's motion for summary judgment concurrently. Nevertheless, the court discussed the arguments made under § 523(a)(2)(B) first and then discussed § 523(a)(2)(A) separately. We do the same.

For a debt to be determined nondischargeable under § 523(a)(2)(B) as based on false financial statements, Paul Revere must establish the following elements by a preponderance of the evidence:

(1) a representation of fact by the debtor, (2) that was material, (3) that the debtor knew at the time to be false, (4) that the debtor made with the intention of deceiving the creditor, (5) upon which the creditor relied, (6) that the creditor's reliance was reasonable, (7) that damage proximately resulted from the representation.

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Candland v. Ins. Co. of N. Am. (In re Candland), 90 F.3d 1466,
1469 (9th Cir. 1996).

At the hearing and in the Amended Minute Order that incorporated its tentative ruling, the bankruptcy court examined each element in concluding that Ward's \$290,260 debt owed to Paul Revere was nondischargeable under § 523(a)(2)(B). We agree that the evidence is overwhelming that Ward made false statements regarding his income on which Paul Revere reasonably relied and was damaged.

The representations made at the time Ward filled out his insurance application were deceptive because he created the false impression that his income was derived from a legitimate enterprise, when in fact, Ward colluded with Shacket in defrauding the federal government with the sham corporation, King Medical.

Furthermore, the misrepresentations were material because the disability payments made to Ward would be calculated initially according to the financial information Ward provided.

See First Interstate Bank of Nev. v. Greene (In re Greene), 96

B.R. 279, 283 (9th Cir. BAP 1986) ("material falsity" can be premised upon the inclusion of false information or upon the omission of information about debtor's financial condition).

As the bankruptcy court found, Ward knew that these representations or omissions from his application were false. It

can also be inferred that Ward intended to deceive Paul Revere because he probably knew he would be forced to resign or he would face disciplinary action with the State Bar when he applied for disability insurance less than a month after formal disciplinary charges were filed against him by the State Bar.

Paul Revere reasonably relied on Ward's representations, evidenced by its issuance of the policy, which proximately resulted in damage of about \$290,260 in payments.

These facts are not in dispute. The bankruptcy court was correct in ruling that the debt was nondischargeable under \$523(a)(2)(B).

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In order to establish that a debt is nondischargeable under § 523(a)(2)(A), the creditor must establish five elements by a preponderance of the evidence:

(1) misrepresentation, fraudulent omission or deceptive conduct by the debtor; (2) knowledge of the falsity or deceptiveness of his statement or conduct; (3) an intent to deceive; (4) justifiable reliance by the creditor on the debtor's statement or conduct; and (5) damages to the creditor proximately caused by its reliance on the debtor's statement or conduct.

Harmon v. Kobrin (In re Harmon), 250 F.3d 1240, 1246 (9th Cir. 2001).

Again, the bankruptcy court methodically analyzed each element at the hearing and in the Amended Minute Order that incorporated its tentative ruling, in determining that the \$290,260 debt owed to Paul Revere was nondischargeable under \$ 523(a)(2)(A). We hold that the bankruptcy court did not err in this regard.

Ward's misrepresentation on his claim for disability that he was completely disabled constitutes deceptive conduct because, in actuality, he continued to receive \$6,000 a month from Shacket for more than a year and a half after he began receiving disability payments from Paul Revere.

Furthermore, with Ward's testimony and plea agreement in evidence, we agree with the bankruptcy court that Ward's knowledge of falsity can be inferred by his silence as to the \$6,000 per month payments that were made to Ward post-disability and as to the existence of the "client trust account" in Las Vegas.

As discussed earlier, Ward's intent to deceive can be inferred from the circumstances, Paul Revere justifiably (and reasonably) relied on Ward's claim of disability by making payments, and Paul Revere was damaged in the amount of \$290,260.

With the elements of  $\S$  523(a)(2)(A) satisfied, Paul Revere established that the \$290,260 in payments to Ward were nondischargeable.

Paul Revere carried the initial burden under Federal Rule of Civil Procedure 56(c). No genuine issue of material fact was presented to the bankruptcy court. Although Ward contends that whether he suffered a physical or mental disability is a genuine issue of fact, the bankruptcy court emphasized that his disability was not at issue here. Rather, the issue was whether fraud and misrepresentations were committed, and he did not raise any genuine issue of material fact regarding the controlling question.

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Thus, with no genuine issues of material fact, the bankruptcy court did not err in granting Paul Revere summary judgment as a matter of law.

Affirming the bankruptcy court's decision to grant Paul Revere's motion for summary judgment determining the existence of the \$290,260 debt and determining that the debt was nondischargeable, we further hold that the bankruptcy court did not err in denying Ward's motion for judgment on the pleadings, or alternatively, for summary judgment.

## CONCLUSION

Thus, we AFFIRM the bankruptcy court's ruling that the \$290,260 received by Ward in disability payments was nondischargeable pursuant to adequate, independent theories under \$\\$ 523(a)(2)(A) and (B). There were no genuine issues of material fact and Paul Revere was entitled to summary judgment as a matter of law.

We further hold that the determination of the existence of the debt was a core proceeding, that the court's explanation of its reasoning was sufficiently specific for appellate review, that the evidentiary objections were correctly overruled, and that no new matters not previously alleged in the adversary complaint were raised in Paul Revere's summary judgment motion.